

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GILVERTO HERRERA and  
CLAUDIA HERRERA,  
Plaintiffs,  
v.  
ALLIANCEONE RECEIVABLE  
MANAGEMENT, INC., et al.,  
Defendant.

Case No.: 14cv1844 BTM (WVG)

**ORDER DENYING IN PART AND  
GRANTING IN PART  
DEFENDANT'S MOTION TO  
DISMISS AND GRANTING  
DEFENDANT'S MOTION TO  
STRIKE**

On July 24, 2015, Defendant AllianceOne Receivable Management, Inc., filed a motion for partial dismissal and a motion to strike portions of Plaintiffs Gilverto and Claudia Herrera's First Amended Complaint ("FAC"). For the reasons discussed below, the Court **DENIES IN PART** and **GRANTS IN PART** Defendant's motion for partial dismissal and **GRANTS** Defendant's motion to strike.

**I. FACTUAL BACKGROUND**

The allegations in Plaintiffs' FAC, filed on June 23, 2015, stem from a "Demand for Payment-Court Ordered Debt Collection" issued by the Franchise

1 Tax Board and received by Plaintiff Gilverto Herrera in January 2012. (FAC ¶ 5.)  
2 The demand was submitted to the Franchise Tax Board by AllianceOne, and  
3 referenced three cases in San Diego Superior Court against a “Gilberto G.  
4 Herrera” for unpaid traffic tickets. (FAC ¶¶ 5, 10.) Because Plaintiffs believed the  
5 demand was for a different individual, Plaintiffs faxed a letter in February 2012 to  
6 the Franchise Tax Board and AllianceOne and included a copy of Gilverto’s  
7 driver license and social security card as identification. (FAC ¶ 7.) Plaintiffs also  
8 visited Defendant’s office at the San Diego Superior Court, South County,  
9 multiple times in February and March 2012. (FAC ¶ 8.)

10 Plaintiffs’ income tax refund was seized and sent to the Franchise Tax  
11 Board on March 21, 2012. (FAC ¶ 9.) Plaintiffs subsequently filed a petition in  
12 San Diego Superior Court for the return of the funds and to remove the case from  
13 Gilverto’s credit record. (FAC ¶ 11.) The Plaintiffs received a judgment in their  
14 favor in May 2012 and Gilverto successfully removed the citations from his  
15 driving record soon thereafter. (FAC ¶¶ 11-12.)

16 Plaintiffs allege that despite the court order, Defendant continued  
17 contacting Plaintiffs on their residential telephone and by mail. (FAC ¶ 13.)  
18 Plaintiffs also allege that Gilverto’s credit score was negatively impacted as a  
19 result of Defendant’s actions. (FAC ¶ 13.) Specifically, Plaintiffs allege that they  
20 were denied credit on several occasions, had difficulty refinancing their home  
21 loan, and obtained loans at a higher interest rate because of Gilverto’s low credit  
22 score. (FAC ¶ 13.) Plaintiffs also insist that they continued to receive notices from  
23 the Franchise Tax Board and IRS about non-payment of fines and potential  
24 garnishment of their property and future wages. (FAC ¶ 13.)

25 Gilverto works for the Department of Defense and maintains a security  
26 clearance, which allegedly requires that he maintain a good credit rating. (FAC ¶  
27 14.) Because of the adverse credit report, Plaintiffs allege that Gilverto received  
28 an adverse work evaluation and that his job was in jeopardy. (FAC ¶ 14.)

1 Plaintiffs' claims allege stress, anguish, and physical and mental harm  
2 caused by Defendant's conduct. (FAC ¶ 15.) Plaintiffs assert that Defendant  
3 called Plaintiffs at least once a month through on their landline, harassing  
4 Plaintiffs and demanding payment. (FAC ¶ 16.) Plaintiffs' FAC alleges the  
5 following causes of action: (1) conversion; (2) violations of California's Code of  
6 Business and Professions; (3) negligence; (4) invasion of privacy; (5-6) violations  
7 of the Telephone Consumer Protection Act ("TCPA"); (7) violation of California's  
8 Bane Act; (8) violations of California's Consumer Credit Reporting Agencies Act  
9 ("CCRAA"); (9) violations of the Fair Credit Reporting Act; and (10-11)  
10 constitutional violations.

11

## 12 **II. DISCUSSION**

13 Defendant filed a motion for partial dismissal and a motion to strike portions  
14 of Plaintiffs' FAC on June 24, 2015. Specifically, Defendant moves to dismiss  
15 Plaintiffs' TPCA claims, CCRAA claims, Bane Act claims, and constitutional  
16 claims, and moves to strike the portions of the FAC that pertain to the Fair Debt  
17 Collection Practices Act and California's Rosenthal Act. Each argument is  
18 discussed in turn below.

19

### 20 **A. Motion to Dismiss**

#### 21 ***1. Standard of Review***

22 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should  
23 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or  
24 sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police  
25 Dept., 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss,  
26 the allegations of material fact in plaintiff's complaint are taken as true and  
27 construed in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc.  
28 v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

1       Although detailed factual allegations are not required, factual allegations  
 2 “must be enough to raise a right to relief above the speculative level.” Bell  
 3 Atlantic v. Twombly, 550 U.S. 544, 555 (2007). “A plaintiff’s obligation to prove  
 4 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
 5 conclusions, and a formulaic recitation of the elements of a cause of action will  
 6 not do.” Id. “[W]here the well-pleaded facts do not permit the court to infer more  
 7 than the mere possibility of misconduct, the complaint has alleged - but it has not  
 8 show[n] that the pleader is entitled to relief.” Ashcroft v. Iqbal, 565 U.S. 662, 679  
 9 (2009) (internal quotation marks omitted). Only a complaint that states a  
 10 plausible claim for relief will survive a motion to dismiss. Id.

11       **2. Telephone Consumer Protection Act (“TCPA”) Claims**

12       Plaintiffs’ fifth and sixth causes of action allege that Defendant violated the  
 13 TCPA when Defendant used an automatic telephone dialing system with an  
 14 artificial or prerecorded voice to call Plaintiffs on their home phone without their  
 15 consent. (FAC ¶¶ 55-57, 69-72.) Defendant argues that debt collection calls to  
 16 residential telephone lines are exempt from TCPA protection.

17       The TCPA generally prohibits “using an artificial or prerecorded voice to  
 18 deliver a message without the prior express consent of the called party.” 47  
 19 U.S.C. § 227(b)(1)(B). However, calls are exempt from the TCPA if they are  
 20 “initiated for emergency purposes, [are] made solely pursuant to the collection of  
 21 a debt owed to or guaranteed by the United States, or [are] exempted by rule or  
 22 order by the Commission . . . .” Id. Pursuant to regulations promulgated by the  
 23 Federal Communication Commission (“FCC”), calls not made for a commercial  
 24 purpose, or calls made for a commercial purpose that do not “include or  
 25 introduce an advertisement or constitute telemarketing” are also exempt from the  
 26 TCPA. 47 C.F.R. § 64.1200(a)(3)(ii)-(iii).

27       The FCC has on occasion addressed the applicability of the TCPA’s  
 28 exemptions as they pertain to debt collection calls. In 1992, the FCC stated that,

1 “an express exemption . . . for debt collection calls is unnecessary because such  
2 calls are adequately covered by [existing] exemptions . . . .” Rules and  
3 Regulations Implementing the TCPA, 7 FCC Rcd. 8752, 8773 (Oct. 16, 1992)  
4 (“1992 Report and Order”). Specifically, debt collection calls “would be exempt  
5 from the prohibitions on such calls to residences as: (1) calls from a party with  
6 whom the consumer has an established business relationship, and (2)  
7 commercial calls which do not adversely affect privacy rights and which do not  
8 transmit an unsolicited advertisement.” Id.

9 In 1995, the FCC again reiterated its decision that “prerecorded debt  
10 collection calls are adequately covered by exemptions adopted in our rules.”  
11 Rules and Regulations Implementing the TCPA, 10 FCC Rcd. 12391, 12400  
12 (Aug. 7, 1995) (“1995 Report and Order”). The FCC further clarified that  
13 “prerecorded debt collection calls are exempt from the prohibitions on  
14 prerecorded calls to residences as commercial calls which do not transmit  
15 unsolicited advertisement.” Id. (citing 1992 Report and Order, 7 FCC Rcd. at  
16 8773) (alterations omitted).

17 However, the FCC has not specifically addressed the applicability of the  
18 TCPA to debt collection calls with made to non-debtors. Given this ambiguity in  
19 the FCC’s regulations, courts have struggled to determine how the FCC’s explicit  
20 language—exempting “debt collection calls”—applies when the calls are  
21 erroneously made to non-debtors.

22 The court in Watson v. NCO Group, Inc., 462 F. Supp. 2d 641 (E.D. Pa.  
23 2006), noted that a non-debtor has a greater right to privacy than someone who  
24 has fallen into debt. The court stated that the FCC exempted calls that “adversely  
25 affect the privacy rights intended to be protected by the TCPA.” Id. at 645.  
26 Therefore, because the court held that a non-debtor’s rights are violated when  
27 they are subjected to erroneous debt collection calls, the court found that the  
28 defendant’s calls were not exempt from the TCPA. Id.

1       However, in Franasiak v. Palisades Collection, LLC, 822 F. Supp. 2d 320  
 2 (W.D.N.Y. 2011), the court held that all debt collection calls are exempt under the  
 3 FCC's regulations regardless of whether or not the intended recipient was in fact  
 4 a debtor. The court noted that grouping calls to debtors and non-debtors together  
 5 afforded the proper deference to the FCC's regulations. Id. at 325; see also  
 6 Santino v. NCO Fin. Sys., Inc., No. 09-CV-982-JTC, 2011 WL 754874 (W.D.N.Y.  
 7 Feb. 24, 2011) (noting that the court in Watson failed to "accord appropriate  
 8 judicial deference to agency rules"); Meadows v. Franklin Collection Serv., Inc.,  
 9 No. 09-CV-605-LSC, 2010 WL 2605048 (N.D. Ala. June 25, 2010) (stating that  
 10 the FCC has determined that all debt collection calls are excluded from the  
 11 TCPA, including contacts to non-debtors) aff'd in relevant part, 414 Fed. App'x  
 12 230 (11th Cir. 2011).

13       The Court agrees with the reasoning in Franasiak. The FCC explicitly  
 14 stated that prerecorded debt collection calls are covered by the exemption that  
 15 applies to commercial calls that do not transmit an unsolicited advertisement.  
 16 See 1995 Report and Order, 10 FCC Rcd. At 12400. Until the FCC instructs  
 17 otherwise, the Court follows the reasoning in Franasiak, and holds that the  
 18 phrase "debt collection calls" in the FCC's regulations includes calls made to  
 19 non-debtors.

20       Applied to the case at hand, Plaintiffs' TCPA claims should be dismissed.  
 21 Although Plaintiffs allege that they are non-debtors, Defendant's calls were made  
 22 for a commercial purpose and did not transmit an unsolicited advertisement. It is  
 23 for the FCC, not the Court, to determine whether or not debt collection calls  
 24 made to non-debtors are an exception to the general debt collection exemption.  
 25 Therefore, Defendant's motion to dismiss Plaintiffs' fifth and sixth causes of  
 26 action is **GRANTED**.

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1       **3. Consumer Credit Reporting Agencies Act (“CCRAA”) Claims**

2       Plaintiffs’ eighth cause of action states that Defendant’s conduct violated  
 3 the CCRAA because the Defendant knew or should have known that the  
 4 information supplied by Defendant to credit reporting agencies was based on an  
 5 incorrect claim. (FAC ¶ 94.) In part, section 1785.25(a) of the CCRAA states that,  
 6 “[a] person shall not furnish information on a specific transaction or experience to  
 7 any consumer credit reporting agency if the person knows or should know that  
 8 information is incomplete or inaccurate.” Cal. Civ. Code § 1785.25(a).

9       Here, Plaintiffs’ allegations are sufficient to state a claim under the CCRAA.  
 10 Plaintiffs allege that they attempted to notify Defendant to explain that the  
 11 demand order references a different person. Based on these allegations,  
 12 Plaintiffs have a plausible claim that Defendant should have known the  
 13 information regarding the debt was potentially inaccurate. See Duell v. First Nat’l  
14 Bank, No. 14cv2774-WQH-JLB, 2015 WL 4602008, at \*10 (S.D. Cal. July 29,  
 15 2015). Therefore, Defendant’s motion to dismiss Plaintiffs’ CCRAA claims is  
 16 **DENIED**.

17       **4. Bane Act Claims**

18       Plaintiffs’ seventh cause of action alleges violations of California’s Bane  
 19 Act. The Bane Act provides a cause of action for any persons deprived of federal  
 20 or state constitutional rights through “threat, intimidation, or coercion, or attempts  
 21 to interfere by threat, intimidation, or coercion.” Cal. Civ. Code § 52.1(a).  
 22 Although Bane Act claims were initially interpreted to apply only to hate crimes,  
 23 “the California Supreme Court subsequently broadened [the Act’s] application  
 24 and held that ‘plaintiffs need not allege that defendants acted with discriminatory  
 25 animus or intent, so long as those acts were accompanied by the requisite  
 26 threats, intimidation, or coercion.’” Estate of Lopez v. City of San Diego, No.  
 27 13cv2240-GPC-MDD, 2014 WL 7330874, at \*13 (S.D. Cal. Dec. 18, 2014)  
 28 (quoting Venegas v. County of Los Angeles, 32 Cal. 4th 820, 842 (2004)).

1 Plaintiffs allege that the repeated phone calls made by the Defendant  
2 caused the Plaintiffs first to fear that they were the victim of identity theft, and  
3 then to fear that Gilverto could lose his security clearance because Defendant  
4 had negatively affected Plaintiffs' credit report. Furthermore, Plaintiffs allege that  
5 Defendant's actions coerced the Plaintiffs into taking time off from work to visit  
6 various police stations and government agencies to deal with the matter. Finally,  
7 Plaintiffs allege that Defendant's actions caused Plaintiffs to suffer physical and  
8 mental harm, stress, and anguish, requiring that the Plaintiffs pursue medical  
9 treatments.

10 First, speech alone cannot support a Bane Act claim unless the speech  
11 threatens violence against a person, and that person "reasonably fears that,  
12 because of the speech, violence will be committed against them or their property  
13 . . . ." Cal. Civ. Code § 52.1(j). Plaintiffs do not allege that the debt collection calls  
14 contained threatening language. Thus, because Defendant never threatened  
15 Plaintiffs with acts of violence, Plaintiffs' Bane Act claim must rely on coercion.

16 Second, a Bane Act claim that relies on a theory of coercion requires  
17 allegations of "such force, either physical or moral, as to constrain [the plaintiff] to  
18 do against his will something he would not otherwise have done." Meyers v. City  
19 of Fresno, No. 10-2359, 2011 WL 902115, at \*7 (E.D. Cal. Mar. 15, 2011)  
20 (quoting Ex Parte Bell, 19 Cal. 2d 488, 526 (1942)).

21 Here, the FAC does not mention any threats of force, nor does it mention  
22 that Defendant applied force for the purpose of making Plaintiffs do something  
23 that they would not have done otherwise. Rather, Plaintiffs received phone calls  
24 seeking to collect on an allegedly mistaken debt. Without more, Plaintiffs'  
25 allegations do no support a claim that they were coerced into acting.

26 Because Plaintiffs have not stated an adequate claim under section 52.1 of  
27 the Bane Act, Defendant's motion to dismiss Plaintiffs' seventh cause of action is  
28 **GRANTED**.

1           **5. Constitutional Claims**

2           Finally, Defendant moves to dismiss Plaintiffs' tenth and eleventh causes of  
 3 action, which state violations of the Equal Protection and Due Process Clauses  
 4 of the United States Constitution, pursuant to 42 U.S.C. § 1983. In general,  
 5 section 1983 claims require the showing of: "a violation of rights protected by the  
 6 Constitution or created by federal statute proximately caused by conduct of a  
 7 'person' acting under color of state law." Crumpton v. Gates, 947 F.2d 1418,  
 8 1420 (9th Cir. 1991). Plaintiffs allege that Defendant "deprived Plaintiffs of liberty  
 9 without due process of law" in violation of the Fifth and Fourteenth Amendment  
 10 (FAC ¶ 111), and "deprived, harassed, intimidated, interfered, and violated  
 11 plaintiffs' rights" in violation of the Equal Protection Clause of the Fourteenth  
 12 Amendment (FAC ¶ 113).

13           (a) Due Process Claims

14           As an initial matter, Plaintiffs' cannot allege a due process claim in violation  
 15 of the Fifth Amendment against a state actor. See Lee v. City of Los Angeles,  
 16 250 F.3d 668, 687 (9th Cir. 2001). Because Defendant was allegedly acting on  
 17 behalf of the state court, Defendant's motion to dismiss Plaintiffs' Fifth  
 18 Amendment Due Process claim is **GRANTED**.

19           A procedural due process claim under the Fourteenth Amendment has  
 20 three elements: "(1) a liberty or property interest protected by the Constitution; (2)  
 21 a deprivation of the interest by the government; (3) lack of process." Portman v.  
 22 County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). A substantive due  
 23 process claim requires that "the plaintiff [] show as a threshold matter that a state  
 24 actor deprived it of a constitutionally protected life, liberty or property interest."  
 25 Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008).

26           Here, Plaintiffs have not alleged what specific liberty or property interest  
 27 has been deprived by Defendant's actions. They merely claim that Defendant's  
 28 acts deprived them of "property, life, liberty, livelihood, and employment." (FAC ¶

1 111.) Regardless of whether Defendant is considered a state actor, Plaintiffs  
2 failed to state a claim for a violation of the Fourteenth Amendment's Due Process  
3 clause because they did not identify a protected life, liberty or property interest  
4 that was wrongfully deprived by the Defendant's actions. Therefore, Defendant's  
5 motion to dismiss Plaintiffs' tenth cause of action is **GRANTED**.

6 (b) Equal Protection Claims

7 A section 1983 claim for a violation of the Equal Protection Clause of the  
8 Fourteenth Amendment requires that, "a plaintiff must show that the defendants  
9 acted with an intent or purpose to discriminate against the plaintiff based upon  
10 membership in a protected class." Thornton v. City of St. Helens, 425 F.3d 1158,  
11 1166 (9th Cir. 2005) (citations and internal quotations omitted). Plaintiffs do not  
12 allege that they are part of a protected class, nor do they allege that Defendant's  
13 actions were motivated by an intent or purpose to discriminate. Plaintiffs only  
14 allege that Defendant "deprived, harassed, intimidated, interfered and violated  
15 plaintiffs' rights . . ." (FAC ¶ 113.) Therefore, Defendant's motion to dismiss  
16 Plaintiffs' eleventh cause of action is **GRANTED**.

17  
18 **B. Motion to Strike**

19 Defendant also moves to strike the portions of the FAC that pertain to the  
20 Fair Debt Collection Practices Act ("FDCPA") and California's Rosenthal Act.  
21 Plaintiffs did not address this argument in their opposition brief.

22 Rule 12(f) of the Federal Rules of Civil Procedure states that a district court  
23 may "strike from a pleading . . . any redundant, immaterial, impertinent, or  
24 scandalous matter." Generally, a motion to strike serves to "avoid the  
25 expenditure of time and money that must arise from litigating spurious issues by  
26 dispensing with those issues prior to trial." Whittleston, Inc. v. Handi-Craft Co.,  
27 618 F.3d 970, 973 (9th Cir. 2010) (internal quotations and citations omitted).

28 //

In a June 18, 2015 order granting partial summary judgment, the Court dismissed Plaintiffs' FDCPA and Rosenthal Act claims. (See ECF No. 39, p.18.) Because the Court previously held that Plaintiffs' identical FDCPA and Rosenthal Act claims could not be included in the FAC, the Court **GRANTS** Defendant's motion to strike.

### **III. CONCLUSION**

For the reasons discussed above, Defendant's motion is **GRANTED IN PART** and **DENIED IN PART**. Plaintiffs' fifth, sixth, seventh, tenth, and eleventh causes of action are **DISMISSED** without prejudice. Furthermore, the Court strikes the portion of Plaintiffs' FAC that pertains to the FDCPA and the Rosenthal Act.

Plaintiff has fifteen (15) days from the filing of this order to file an amended complaint.

## IT IS SO ORDERED.

Dated: March 17, 2016

Barry Ted Moskowitz  
Barry Ted Moskowitz, Chief Judge  
United States District Court